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Labor Law Bulletin

Labor Board Lacked Authority to Issue More Than 600 Decisions

On June 17, 2010, the U.S. Supreme Court ruled that the National Labor Relations Board (NLRB) did not have a statutory quorum when it decided over 600 cases during a two-year period. A significant number of these cases may be reopened. *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457.

Under the National Labor Relations Act, the Board consists of five members, with a quorum of no less than three. The statute permits the Board to delegate its authority to no less than three members. In December 2007, because Congress did not fill expired vacancies, the Board was reduced to two members. It nonetheless continued to decide cases over the next 27 months on the theory that the two members constituted a quorum of the three-member group to whom authority had been delegated. That two-member panel issued over 600 decisions. (Recess appointments made in March 2010 have brought the Board to a four-member quorum).

The Supreme Court held that a two-member group could not issue decisions on behalf of the Board, writing that, "If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect rather than be swept aside in the face of admittedly difficult circumstances."

What does this mean? At a minimum, the Board likely must re-decide the approximately 75 decisions appealed to and pending before the Supreme Court or federal courts of appeals on the same grounds. Employers and unions may try to reopen cases not appealed on those grounds on the theory that decisions rendered by an administrative agency without jurisdiction are not final and binding. The counter-argument is that a litigant who did not raise the jurisdictional objection in a timely manner cannot raise it now. We can expect that numerous courts will face this issue and it, too, may end up in the Supreme Court. On a practical level, employers who have already complied with a remedial order may decide that they will fare no better under the current 3–1 Democratic Board majority and decide to move on.

Employers who have pending cases at the NLRB will not be directly affected by the Supreme Court's decision beyond the fact that their cases are not likely to be decided soon. The Board will have to implement a strategy for resolving the logjam of cases likely to be reopened. (Note that, while the Board currently has four members, the term of one of those members expires in August, with the terms of the other three expiring by the end of next year, a situation which could result in further delays.)

Vedder Price attorneys can assist you in assessing how the Supreme Court's decision affects you. If you are interested in learning more about the decision and its implications, or would like to discuss how it impacts a particular case, please contact our Traditional Labor Group Chair **J. Kevin Hennessy** (312-609-7868), or **Kenneth F. Sparks** (312-609-7877) in Chicago, or **Neal I. Korval** (212-407-7780) or **Lyle S. Zuckerman** (212-407-6964) in New York, or any other Vedder Price attorney with whom you have worked.

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Amy L. Bess 202-312-3361

VEDDER PRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47TH FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

875 15TH STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

www.vedderprice.com

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Questions or comments concerning the LABOR LAW BULLETIN or its contents may be directed to the firm's Labor Practice Leader, Thomas M. Wilde (312-609-7821), the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780) or, in Washington, D.C., Amy L. Bess (202-312-3361).